No. 21,825

United States Court of Appeals

For the Ninth Circuit

BERNARD HIATT,

Appellant,

vs.

EMIL A. SCHLECHT, E. B. WEBER, NORMAN L. BUCKNER, ROBERT J. CALEY, CARL M. HALVORSON, ERIC HOFFMAN, J. M. STEINMULLER, JR., and RALPH PIERSON, as Trustees for the Oregon-Washington Carpenters-Employers Health and Welfare Trust Fund and as Trustees for the Oregon-Washington Carpenters-Employers Pension Trust Fund,

Appellees.

Appeal from the United States District Court for the District of Oregon

APPELLANT'S BRIEF

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JURISDICTION

This is an appeal from a judgment rendered by the United States District Court for the District of Oregon. The lower Court held that it had jurisdiction because Appellant's activities "affects commerce" and that a labor dispute in his operation would tend

to burden the free flow of commerce. It has been Appellant's contention that the lower Court did not have jurisdiction over the cause, in that Appellant's activities within the industry do not "affect commerce" as that term is used in the Labor and Management Relations Act (hereinafter referred to as the "LMRA") 29 USCA 185 (a) and 142 (1).

The United States Court of Appeals for the Ninth Circuit has jurisdiction of this appeal under Rule 73 of the Federal Rules of Civil Procedure. Notice of Appeal was filed in the time and manner required by law. (CR 130.)*

STATEMENT OF THE CASE

Appellees (hereinafter referred to as "Trustees", "Plaintiffs" or "Appellees"), as Trustees of both a pension and health and welfare trust fund, filed a complaint (CR 1) against Appellant (hereinafter referred to as "Hiatt", "Defendant", "Employer" or "Appellant"), a small building contractor seeking specific performance of certain trust agreements (Plaintiff's Exhibits 1 and 2) calling for monthly contributions by an employer to Trust Funds for the benefit of the employer's employees.

Appellant denied he entered into any such Trust Agreements with the Appellees, or into any Master Carpenters Labor Agreement (of any date) (Plaintiff's Exhibits 3 and 4), incorporating said Trust

*CR refers to Clerk's Record;
R/T refers to Reporter's Transcript.

Agreements. (RT 57.) Appellant has further denied and has contended throughout that the "Trades Council Agreement" (Plaintiff's Exhibit 6), the only document signed by him, does or ever was intended to incorporate a Master Carpenters Labor Agreement, allegedly in turn incorporating the Trust Agreements under which the United States District Court found Appellees were entitled to recover.

As noted above, Appellant has further challenged the lower Court's jurisdiction in view of Appellant's activities, and the effect, if any, on interstate commerce.

STATEMENT OF FACTS

1. In 1963, Appellant, then 29 years old, high school graduate, was and had been engaged for approximately five (5) years in construction and home building. (RT 49.) He was averaging approximately $150,000.00 per year gross actively by 1965, which included the letting out of subcontracts. In 1965 he estimated he did $100,000.00 activity. (Hiatt Deposition, page 7.)

2. In August of 1963, Appellant testified a Union representative called on him and asked him to sign an "agreement" that would assure that all subcontractors, particularly the electricians, were union shops. Mr. Hiatt was given the distinct impression that the Union's main objective was to assure that a particular non-union electrical subcontractor would be put off the job in progress. Mr. Hiatt refused and a picket was put on the jobsite. (RT 53, 58.)

3. During the next six weeks or so, Mr. Hiatt had occasion to talk to the Union representatives twice in the vicinity of the construction project. (RT 52.) It was Appellant's unequivocal testimony that at no time was there any discussion as to any Trust Funds or Master Labor Agreements (RT 56); rather the discussion centered around the non-union electrical subcontractor and the effect of any agreement on the Hiatt's men who were non-union. (RT 58, 16.) In this regard Mr. Hiatt was advised the representatives would be responsible to convince the non-union men that it was to their advantage to join the Union. (RT 54, 59.) Mr. Hiatt stated at no time was there ever physically transmitted to him any agreements whatever until the time of his signing the Trades Council Memorandum. (RT 51, 56, 59.) Appellees' witness, Mr. J. Horstrup, confirmed this. (RT 23.)

4. Appellees' three witnesses Union representatives) varied as to the extent (RT 33, 43) and scope of the conversation held with Mr. Hiatt (RT 23, 29, 30). One conceded that he could recall no specific reference or review whatever was made of any pension plan (RT 17); and with one exception, Appellees' witnesses reluctantly admitted there was either no review or only limited review of the Trades Council Memorandum or of any Master Carpenters Labor Agreements of any date (RT 23, 30, 41). The exception was a Mr. "Pat" Randall, who indicated detailed reference was made to the various four agreements ranging from four (4) pages (Trades Council Memorandum, Pl. Ex. 6) to 31 pages (Pension Trust Agreement, Pl. Ex. 1). (RT 30, 37.) During the

course of the trial, this Court indicated it would be hard put to accept the testimony of Mr. Randall. (RT 66.)

In the District Court's opinion (CR 126, line 29), the trial judge indicated he did "not believe that any of them accurately remember what they said." He doubted "whether the Union representatives discussed in detail the specific provisions of the Building Trades Agreement or the Carpenters Labor or Trust Agreements", but he did think they made "any false or misleading statements".

5. On October 4, 1963, Appellant, admittedly visually upset (RT 26; Horstrup deposition, page 18), went to the Union office, complained that the Union had cost him a great deal of money (RT 22), that he had to have the pickets off the job, and that he would sign whatever it was they had asked him to sign (RT 26). Appellant claims this is the first time he saw the Trades Council Memorandum (RT 51); that he didn't read it, but signed it and left; he was not there for more than ten (10) minutes (RT 56, 57, 24). The pickets were removed shortly thereafter. (RT 60.)

6. Appellant made no contribution to either Fund and Appellees filed suit July 23, 1965. (Plaintiff's Answer to Defendants' Interrogatories, No. 9.)

7. The only document signed by the Appellant is that certain document dated October 4, 1963, labeled "Lane-Coos-Curry-Douglas Counties Building and Construction Trades Council Articles of Agreement"; this document is in turn signed by "J. Horstrup" as Secretary of "Lane-Coos-Curry-Douglas Counties

Building and Construction Trades Council". (Plaintiff's Exhibit 6, RT 57.)

8. Neither the "Lane-Coos-Curry-Douglas Counties Building and Construction Trades Council" nor any of the trades it represented or the Appellant were signatories to any of the alleged incorporated agreements introduced into evidence, including the Health and Welfare Trust Fund, the Carpenters Employers Pension Trust Fund or the Master Carpenters Labor Agreement of either 1962 or 1965. (Exhibits 1 through 4, RT 57.)

9. There was a substantial change in April of 1965 of both the Health and Welfare Trust Fund (Pl. Ex. 1) and the Carpenters Employers Pension Trust Fund (Pl. Ex. 2), in that benefit contributions under both of these agreements were increased by the newly negotiated and executed Master Carpenters Labor Agreement, dated April 29, 1965 (Pl. Ex. 4). Neither any of the parties to this suit or the Trades Council or any of the trades it represented were a signatory to the latter agreement.

10. The Appellant did not belong to any Employer group or association authorized on his behalf to enter into any agreements, such as the Master Carpenters Labor Agreements of either date, or the Trust Funds, nor did the Appellant authorize or delegate persons to sign for him as to such agreements. (RT 57.)

11. At no time were any of Appellant's employees hired under a contract of employment, incorporating any collective bargaining agreements (Master Carpenters Labor Agreement) or any pension, or health

and welfare agreements; and, as a matter of undisputed testimony, Appellant had employees already on the job when the Trades Council Memorandum was signed and who specifically did not want to be subject to any such Union agreements or have coverage under any trust funds. (RT 52, 53.) The sole recovery sought in the lower Court was for payment to the trust fund as to carpenters or carpenter apprentices employed by Appellant. All of them were non-union employees. (RT 59.)

12. At no time did Appellant's employees receive any benefits from any of the trust funds by reason of their employment with Mr. Hiatt. (Plaintiff's Answer to Defendants' Interrogatories, No. 8.)

13. Appellant did not: (a) construct outside the State of Oregon; (b) subcontract with contractors engaged in business outside the State of Oregon; (c) purchase supplies and materials from persons outside the State of Oregon; (d) contract with subcontractors from outside the State of Oregon; (e) do any business with any firms or companies in other States; (f) work on any Federal, State or political subdivision projects; and (g) had never been involved in any defense projects. (RT 49.)

QUESTIONS PRESENTED

Each of the questions presented by this appeal was raised in the District Court.

I.

Does Sec. 301 of the Labor and Management Relations Act of 1947, as amended (29 USCA 185(a)), give the United States District Court jurisdiction when the building contractor involved does not do interstate business, or affect interstate commerce?

II.

Was there a sufficient meeting of the minds as to all terms for the lower Court to find the existence of any agreement in this instance?

III.

Are the extrinsic writings referred to in the Trades Council Memorandum, dated October 4, 1963 (Pl. Ex. 6), sufficiently connected thereto by adequate reference, or by such mutual knowledge and understanding that reference by implication is sufficiently clear?

SPECIFICATION OF ERROR

The District Court erred in its findings, conclusions and entry of judgment insofar as it determined:

1. It had jurisdiction to determine this matter under Sec. 301 of the LMRA of 1947, as amended (29 USCA 185(a), and

2. Any valid agreement was entered into between the Trades Council and the Appellant.

SUMMARY OF ARGUMENTS

I.

Appellant initially argues that the Federal District Court did not have jurisdiction, in that, Appellant's activities are such that he was not engaged in interstate commerce nor did his activities affect interstate commerce as this term is used in 29 USCA 185 (a) and 142 (1).

II.

Appellant's second argument centers around the undisputed fact that the parties to this lawsuit did not enter into any valid agreement or any agreement which vested in the Appellees the right to file their action in the Federal District Court.

III.

Appellant's next argument is that the Appellant and Union representatives did not enter into a valid agreement or have a sufficient meeting of the minds, which vested in the Appellees the right to maintain this action.

IV.

Finally, it is Appellant's contention that the Trades Council Memorandum (the only document signed by Appellant) is so void of reference to the agreements on which the Appellees relied for recovery—under the doctrine of incorporation by reference—that the Appellees have no standing to maintain this action.

ARGUMENTS

I.

THE FEDERAL DISTRICT COURT DOES NOT HAVE JURISDICTION OVER MATTERS NOT INVOLVING INTERSTATE COMMERCE OR WHICH DO NOT AFFECT INTERSTATE COMMERCE.

1. Applicable Federal Constitutional and Statutory Law

It is an undisputable premise that Federal District Courts have no jurisdiction other than that conferred on them by the Congress of the United States within the limits defined by the U. S. Constitution. 36A C.J.S., *Federal Courts,* Section 308, page 10, citing numerous cases. Furthermore, where allegations are made which are necessary to show jurisdiction the action will fail if these are not proven. See Rule 8(a) of the F.R.C.P., and 35A, C.J.S., *Federal Civil Procedure,* Sec. 470, page 696, citing *Jew May Lune v. Dulles,* C.A. Cal., 1955, 226 F. 2d 796. Appellees in Paragraph I of their Complaint affirmatively allege jurisdiction in the District Court by reason of 29 USCA 185 (Sec. 301 of LMRA), but as noted hereinafter did not bear this burden of proof.

Under Art. I, Sec. 8, Clause 3, the Congress has the power "to regulate commerce * * * among the several states."

Under 29 USCA 185, Sec. 301 of the LMRA, it states:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdic-

> tion of the parties, without respect to the amount in controversy, or without regard to the citizenship of the parties."

It is to be noted that although the amount in controversy is immaterial, the matter must involve "an industry affecting commerce". This term is defined in Sec. 142 (1) of Title 29 USCA (Sec. 501 of LMRA) as follows:

> "The term 'industry affecting commerce' means any industry or activity in commerce or in which a labor dispute would burden or obstruct commerce or tend to burden or obstruct commerce or the free flow of commerce."

2. The Evidence

In this case, no evidence was presented by Appellees affirmatively showing jurisdiction in the Court; the evidence did show that Mr. Hiatt is a small contractor in Lane County, Oregon, who over a period of approximately two (2) years prior to 1965, has had an average annual gross business activity of approximately $150,000.00; that he made no sales outside the State of Oregon; no contracts were performed outside the State of Oregon; all supplies and materials were purchased within the State of Oregon; he does not contract with or subcontract to any companies engaged in interstate commerce, and he is not engaged in government or defense work. (RT 49.)

3. "An Industry Affecting Commerce"

Even assuming, arguendo, the existence of a valid agreement permitting Appellees to bring this action, Appellant's activities do not affect commerce within the provisions of 29 USCA 185 (a) and 142 (1).

In *Local 384, et al. v. Maurice Patane, et al.,* 232 Fed. Supp. 740 (Ed. Pa. 1964), the Court made it clear that it was a factual issue to be first resolved as to whether or not a construction employer was engaged in activities or "an industry affecting commerce", and it is clear from that case that jurisdiction exists only when there are facts sufficient to support the Court's jurisdiction. In the *Patane* case, the Court found the business activities of the employer were entirely intrastate, and, accordingly, the U. S. District Court was without jurisdiction.

In the lower Court, Appellees herein cited numerous cases in support of their contention that the District Court had jurisdiction. A review of those cases reflects the following:

In *NLRB v. Denver Building and Construction Trades Council, et al.,* 341 U.S. 675 (1951), raw materials were purchased out of state in the amount of $55,000.00, of which $225.00 was installed in the project being picketed;

In *NLRB v. Fainblatt,* 306 U.S. 601 (1938), the employer, Fainblatt, purchased materials from out of state;

In *International Brotherhood of Electrical Workers v. NLRB,* 341 U.S. 694 (1951), the appellant had offices in New York and the construction job involved was in Connecticut;

In *Plumbers, Steamfitters, et al. v. Door County* (1961), 359 U.S. 354, one-half (½) of the materials were brought in from outside of the state;

In *NLRB v. Reed* (1953), 206 Fed. 2d 184, 9th CCA, there were interstate purchases by the contractor of 3% and in addition, the contractor did business for public utilities and establishments handling goods for out of state shipment; he also sub-contracted work in the amount of $50,000.00 for interstate contractors.

Even where there has been some activity affecting interstate commerce, the Federal Courts have not always assumed jurisdiction. The above definition is substantially parallel to Sec. 2 (7) of the NLRA, Sec. 152 (7) of Title 29 USC which reads:

> "The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lend to a labor dispute burdening or obstructing commerce or the free flow of commerce."

To guide itself in interpreting the phrase "affecting commerce" as it is defined in Sec. 2 (7) NLRA the National Labor Relations Board adopted "jurisdictional yardsticks". Those which went into effect on August 1, 1959, provide in the case of non-retail businesses that jurisdiction will be asserted if the yearly outflow or inflow, direct or indirect, is $50,000.00 or if the business has a "substantial impact" on national defense. (NLRB Release R-506, CCH Labor Law Reporter, Labor Relations Sec. 1610.)

In *Groneman, et al. v. International Brotherhood of Electrical Workers, Local Union No. 354,* 177 F. 2d 995 (1949), the principle of *de minimis* was applied. The District Court dismissed for lack of jurisdiction an action brought by an employer to recover damages

resulting from stoppage of construction work allegedly due to a secondary boycott. The U.S. Court of Appeals for the 10th Circuit affirmed on the ground that the plaintiff's operations were entirely intrastate except for $6,000.00 worth of goods purchased for the job under dispute. The Court found that "the impact of this labor dispute upon commerce . . . is so trifling and microscopic" as to require the application of the *de minimis* doctrine. (177 F. 2d 995 at 997-8.) The same principle was applied in *Newell v. Chauffeurs, Teamsters & Helpers Local Union 795,* 317 P. 2d 817, 181 Kan. 898 (1957). In that case, purchases by a local dairy of about $100.00 per month from other states and purchases from local sources of capital assets which had been manufactured in other states were held to have a negligible effect on interstate commerce. The Court found that such purchases fell under the maxim *de minimis.*

In this case Mr. Hiatt subcontracted his plumbing to other contractors for $800.00 per house, including labor and materials (RT 64); he built houses in the $10,000.00 to $15,000.00 range (RT 50) and averaged $100,000.00 to $150,000.00 a year or 7 to 10 houses annually, indicating plumbing purchases (even indirectly) were very nominal, and within the *de minimis* rule.

4. The District Court's Determination

In his deciding opinion, the able trial judge acknowledged that Appellant "purchased all of his supplies and performed all of his contracts in Oregon and did not do any work either as a contractor or sub-

contractor for any company engaged in interstate commerce". (CR 123.) The Court then stated:

> "Defendant admitted that from October, 1963, to October, 1965, he purchased $300,000.00 worth of supplies for use in his construction business and although he may have purchased all of his supplies locally, the plumbing and electrical fixtures and supplies were manufactured outside of Oregon." (CR 123.)

At the conclusion of Appellees' (Plaintiffs') case in chief, the Appellant (Defendant) took the stand in his defense; after direct examination and cross-examination (RT 49, 62) Appellees' attorney requested that he be allowed to ask another question. (RT 63.) At this one point the following colloquy took place:

> "By Mr. Bailey:
>
> Q. Mr. Hiatt, did you, during the previous year of 1965 or the present time, purchase from any source inside the State of Oregon, products that originated outside of the State of Oregon?
>
> A. I imagine, I don't know what. I imagine some of the hardware did come from outside the State of Oregon.
>
> Q. Do you know any source, for example, for hot water heaters——
>
> A. I don't know.
>
> The Court: The plumbing comes from outside of the state?
>
> The Witness: I imagine most of it.
>
> The Court: Wash basins, toilets of all kinds, they are manufactured in Wisconsin and various other states.
>
> The Witness: I imagine so.

Q. (By Mr. Bailey): You have purchased those?

A. I buy from a local—the local plumbing contractor here.

Q. Which does originate outside the state?

The Court: I know that.

Mr. Bailey: That was the question I was interested in.

The Witness: I pay on a subcontract for labor material and plumbing.

The Court: That is all.

Mr. Camarot: May I just ask a question?

The Court: Yes.

Q. (By Mr. Camarot): Approximately how much prior to 1963, did you have in the way of plumbing subcontract bid?

A. I was building about three houses a year.

Q. How much was your subcontract bid?

A. Seven hundred or $800 per house.

Q. Does that include labor?

A. Labor and fixtures.

Q. How much approximately would the labor be?

A. I don't know.

Mr. Camarot: No further questions.

Mr. Bailey: No further questions.

The Court: That's all. (Witness excused.)"

This is the only evidence known to Appellant that has any close proximity to the trial Court's assertion, quoted above; this is the only evidence supporting Appellees' affirmative proof of jurisdiction.

At the outset and even assuming the fact that "the plumbing and electrical fixtures and supplies were manufactured outside of Oregon" (a fact that may

well be disputed) the manufacture of these items may be considerably removed from Appellant's purchase thereof. The manufacturer could well have sold them to an Oregon distributor who, in turn, sold them to an Oregon wholesaler, who, in turn sold them to an Oregon supplier, who, in turn, sold them to a local plumbing contractor, who, in turn, made the sale to Appellant's subcontractor. The cases noted above all appear to be concerned with a more immediate and direct affect on commerce.

The Court should not take judicial notice of where a particular item is geographically manufactured unless it is a matter of general public knowledge or concern, which is known by all well-informed persons. 31 C.J.S., *Evidence,* Sections 6 and 9, pages 822 and 824, citing a host of authorities. It has been held that whether gasoline is produced in a state in commercial quantities is not within the common knowledge of well-informed persons. C.f. *Spur Distributing Co. v. Lindsey,* 62 SW 2d 53 (Tenn.), appeal dismissed, 54 Supreme Court 81, 290 U.S. 588, 78 L. Ed. 519. Although in *Wallace, Inc. v. Pfost,* 65 P. 2d 725 (Idaho, 1937), 110 ALR 613, the Court took judicial notice automobiles are not manufactured within the State of Idaho, the nature of the product and its economic effect, if such had been manufactured within the state, explains the ruling, and it is readily understandable why this would be a fact of common knowledge.

It is submitted that the lower Court took notice of an alleged fact of which it appears he may have

had some personal opinion, but, as stated above, judicial knowledge is generally limited to what a judge knows in his judicial capacity or concerns a fact generally or notoriously known. See *Laurance v. Laurance* (1953) 198 Or. 630, 258 P. 2d 784, 787, quoting 31 C.J.S., *Evidence,* Sec. 11, page 832.

II.

THE APPELLEES AND THE APPELLANT HAVE NOT ENTERED INTO ANY VALID AGREEMENT WHICH IMPOSES ANY CONTRACTUAL LIABILITY ON THE APPELLANT IN FAVOR OF APPELLEES.

There is at least one clear-cut case wherein the Court refused to find a contractual liability under a welfare plan where the trustees or representatives of the welfare plan were not signatories to an alleged agreement between an employer and a union.

In *Seafarers' Welfare Plan v. George E. Light Boat Storage, Inc.,* CCH 53 Labor Cases, Paragraph 11,364, the Texas Court of Civil Appeals refused to set aside a trial Court's finding that there was no binding agreement between the employer and the representatives of a welfare plan so as to require contributions to be paid by the employer.

> "It should be noted here that appellant failed to obtain the testimony of Drozak either in person or by deposition, and failed to introduce any evidence that there was any oral or written agreement between the three parties which was entered into by them all. It merely introduced in evidence a one-page incomplete agreement which was not executed by Seafarers' Welfare Plan. Drozak,

> who signed the agreement for the Union as its alleged agent, was not present at the trial, and, as stated, did not testify. There is nothing to show that there was any oral agreement between the parties prior to the incomplete written form of agreement. There is no evidence that appellant consented to the terms of the written agreement which it did not execute, nor that there was any meeting of the minds of the three parties involved or any promise or obligation mutually binding on all three of them to do anything. Appellant complains that the court's finding is not supported by any evidence and also that such finding is against the great weight and preponderance of the evidence. It is our view that there is evidence which supports the court's finding."

There is a like void of evidence in this case.

The appellant in the *Seafarers'* case also attempted to allude to the existence of a bargaining agreement to support its position. The Court refuted this contention by stating:

> "The evidence shows that George E. Light did not sign any collective bargaining agreement. The only collective bargaining agreement in the record is that between the Union and appellee, which was executed by Drozak for the Union and by Joe B. Light for appellee. Appellee asserts, however, that Joe B. Light had no authority from the board of directors of the company to execute the collective bargaining agreement. It is our view that it is not necessary for this Court to determine whether or not there was a valid collective bargaining agreement entered into by the Union and appellee. Appellant was not a party to the col-

> lective bargaining agreement and as stated there was no collective bargaining between appellant and appellee."

Mr. Hiatt comes within the category of a non-member employer in that he is not an employer represented by other employers or a signatory Association. The evidence is unequivocal in this regard. Section 2 of Article IX of the Trust Argeement and Pension Plan (Pl. Ex. 1) and Section 2 of Article IX of the Health and Welfare Trust Fund (Pl. Ex. 2) both have the following language:

> "Section 2. Any Individual Employer who is not a member of or represented by Employers or a Signatory Association, but who is performing work of the type coming under the terms of the Collective Bargaining Agreement and within the jurisdiction of Union, may become a party to this Trust Agreement by executing in writing and depositing with the Board of Trustees his or its acceptance of the terms of this Trust Agreement in a form acceptable to the Board."

There is absolutely no evidence that Mr. Hiatt at any time sought to become a party to either trust agreement "by * * * acceptance of the terms of (either) trust agreement in the form applicable to the Board". (The word "either" has been substituted for the word "this" in the actual language of the Section.) This, by the Appellees' own prerequisites which it is submitted is a condition precedent, there has not been a valid offer or acceptance required by the Trust Agreement which would bind the parties to this action to any agreement.

III.

THERE WAS AN INSUFFICIENT MEETING OF THE MINDS AS TO ALL THE TERMS FOR THE LOWER COURT TO FIND THE EXISTENCE OF AN AGREEMENT IN THIS INSTANCE.

IV.

EXTRINSIC WRITINGS IDENTIFIED IN ANY AGREEMENT MUST BE SUFFICIENTLY CONNECTED THERETO BY SPECIFIC REFERENCES, OR BY SUCH MUTUAL KNOWLEDGE AND UNDERSTANDING THAT REFERENCE BY IMPLICATION IS CLEAR.

1. Introduction

Arguments II, III and IV overlap. As to Argument II, the contentions therein will also bear in the Arguments herein. In addition, Appellant will argue there was an insufficient meeting of the minds (Argument III) because, among other things, the extrinsic writings which Appellees claim were incorporated by reference into the alleged agreement were not so incorporated as a matter of both fact and law. (Argument IV.)

Conversely, the clear lack of any understanding as to what, if any, extrinsic writings were to be included in the Trades Council Memorandum (Argument IV) is evident from both the testimony and the Memorandum itself, and its obvious ambiguity lends clear support to the failure of the parties to have a meeting of the minds. (Argument III.)

2. Re: III. Insufficient Meeting of the Minds

It is Appellant's position, in part confirmed by Appellees' witnesses, that no reference or discussions

were held with regard to the trust funds; that the two discussions held prior to October 4, 1963, from the jobsite concerned (1) eliminating a non-union electrical subcontractor from the jobsite, and (2) the effect, if any, the contemplated agreement would have on the Appellant's non-union employees. There was no denial that the Appellant was paying wages equal to the Union's requirement. (RT 29.)

The circumstances surrounding the actual execution of the Trades Council Agreement are important and under Oregon law can be considered by the Court (Oregon Revised Statutes 42.220), particularly when a written agreement is ambiguous on its face. (See Oregon Revised Statutes 42.260, and *Klimek v. Perisich,* 231 Or. 71, 371 P. 2d 956 (1962).)

As the District Court noted in the Opinion, he did not believe that either of the parties to the Trades Council Memorandum "accurately remembered what they said" on the two occasions they met, and the Court doubted "whether the Union representatives discussed in detail the specific provisions of the Building Trades Agreement or the Carpenters Labor or Trust Agreement * * *". (CR 126, 127.) Thus, the District Court recognized that there was little discussion of the multi-page documents which the parties are purported to have agreed to.

But of far greater importance is the alleged scope of the purported agreement. To permit recovery, the lower Court had to find that the Trades Council Memorandum (Pl. Ex. 6) incorporated the existing (1962) and future (1965) Master Labor Agreements

(Pl. Exs. 3 and 4) and the Health and Welfare and Pension Trust Fund Agreement (Pl. Exs. 1 and 2).

A cursory examination of the Trades Council Memorandum makes it obvious that the form adopted came from another source. Paragraphs contained therein are completely unrelated. Compare the reference in paragraphs 6 to 8, the latter paragraph having no bearing to paragraph 6.

The relative knowledge and familiarity of the general subject matter as existed between the signatories should be considered. If anything, the representatives of the Union were supposedly far better versed in the subject at hand, and yet it is obvious that there were inconsistencies among them. (RT 24, 25.) In contrast Mr. Hiatt testified that not only had there been no discussion regarding Master Labor Agreements and Trust Funds, but he never had the occasion to see the Trades Council Memorandum until he signed it, and didn't know about its contents. (RT 51.) Obviously, he was assuming the contents included only those subject matters that had been discussed.

The Court's attention is also called to the Trust Fund Agreements, which, among other things, require that:

> "5. There must be a detailed written agreement with the employer specifying the manner of payment."

The Trades Council Memorandum can hardly qualify as a "detailed written agreement."

The appropriate law in this case is found in *Klimek v. Perisich,* supra. The Oregon Supreme Court, citing

numerous cases and authorities reaffirmed the following principles of contract law:

> "It is well settled that when a contract is to be found on an offer and acceptance, it must be shown that the latter coincides with the former, and unless this appears there is no agreement." (p. 78 id.)

In other words, there must be a meeting of the minds as to the obligation each assumes under the contract before it can be said that a contract exists. The record makes it obvious that there was no meeting of the minds in this instance.

In *Reed, et al. v. Montgomery,* 180 Or. 196, 220, 175 P. 2d 986, 1006 (1947), the Supreme Court stated:

> "Before there can be a valid contract the parties must have a distinct intention, common to both and without doubt or difference, so that there is a meeting of the minds as to all terms, and if any portion of the proposed terms is not settled or no mode is agreed on by which it may be settled, there is no agreement."

In support of this holding, the Court cited the following authorities:

(1) *Williston on Contracts,* Rev. Ed. Sec. 45;

(2) 12 Am.Jur. *Contracts,* Secs. 23 and 24, p. 519;

(3) 17 C.J.S. *Contracts,* Secs. 31 and 49, pp. 359, 394;

(4) Restatement of the Law, *Contracts,* Sec. 32;

(5) Numerous cited Oregon cases.

Oregon holds to the rule that every contract must be definite and certain as to the terms to be per-

formed by either party, and where the Court cannot fix the exact legal liability of the parties, the contract is unenforceable. See *Gaines v. Vandecar,* 59 Or. 187, 115 P. 721; rehearing denied 59 Or. 187, 115 P. 1122 (1911); *Bonnevier et ux. v. Dairy Cooperative Association,* 227 Or. 123, 361 P. 2d 262; *Landgraver et ux. v. DeShazer et ux.,* 239 Or. 466, 398 P. 2d 193.

It is submitted that there was no meeting of the minds of the two signatories to the Trades Council Memorandum.

3. Re: IV. Extrinsic Writings Must Be Connected to an Agreement by Clear Reference or by Mutual Knowledge

It has been the Appellant's consistent argument that the incorporation by reference upon which the Appellees must rely to prevail is insufficient in this instance to bring about a valid contract between the parties, at least insofar as it incorporates the collective bargaining agreements and the trust agreements.

In *NLRB v. Local No. 2 of United Association of J and A of P and PI,* 360 Fed. 2d 428, 436 (2nd CCA May, 1966), the Court stated that agreements not explicitly incorporated into a collective bargaining agreement are not a part of that agreement. In that case, they found a provision in a union contract had, by the action of one of the parties, in fact, been incorporated into the agreement.

An interesting case in the field of labor contracts is *Weiner v. Mercury Artists Corporation,* 130 NYS 2d 570 (NY 1954), wherein the agreement between the

owners of a small resort and an employment agency (which had agreed to suppy an orchestra and a leader) contained the following language on a one-page standard form type contract:

> "The rules, laws and regulations of the American Federation of Musicians, and the rules, laws and regulations of the Local in whose jurisdiction the musicians perform * * * *are made part of this contract,* and to *such extent* nothing in this contract shall ever be construed as to interfere with *any obligation which any employee hereunder may owe to the American Federation of Musicians pursuant thereto.*" (Italics added.)

The agency (defendant) sought to stay all proceedings brought by the owners (plaintiffs) contending that an arbitration was required under the rules of the Federation. The Court noted that the sole issue was "whether plaintiffs made a binding and definitive contract to arbitrate any controversy that might arise." In refusing to incorporate the printed booklet of the Federation as part of the contract, the Court made the following observations, which are equally germane to the case at hand:

> "The rules thus allegedly incorporated by reference into the simple one page contract between the parties consists of a 207 page printed booklet in which somewhere between pages 62 and 66 of this bulky document, there is a wordy and at least as to the parties involved, a somewhat vague provision for arbitration to be determined, however, by the *International Executive Board of the Federation.*

> "Plaintiffs are not in the music business, and, of course, they never saw nor were ever made aware of the existence or the nature of the rules of the Federation or informed that they contained any arbitration provisions. Under the circumstances disclosed, we hold that the provision of the contract relating to incorporation of the printed booklet was not sufficiently clear to bind plaintiffs to a definitive contract to arbitrate * * *".

This Court's attention is called to the many pages in the Master Carpenter Labor Agreements (Pl. Exs. 3 and 4) and the Trust Fund Agreements (Pl. Exs. 1 and 2).

In *New York Racing Association v. Independent Association of Mutual Employees,* 224 NYS 2d 784 (NY 1962), a memorandum agreement was also entered into between the parties wherein the employer agrees to "continue the pension plan in the form presently in existence * * *" and there was an incorporation by reference of the entire pension plan. Notwithstanding the Court concluded that even

> "Under these circumstances it cannot be said that it was the clear intention of the parties to arbitrate grievances arising under the pension plan. Inasmuch as the pension plan is not incorporated into the collective bargaining agreement, the grievance concerning the administration of its pension plan is not incorporated into the collective bargaining agreement. The grievance concerning administration of its pension plan alleged by the Independent Association does not fall within the ambit of paragraph 18 of the collective

> bargaining agreement, which provides that arbitration is to be had concerning 'all grievances hereunder'."

And see *Hill v. Mercury Record Corporation,* 168 NE 2d 461 (Illinois 1960).

At the time of trial, Appellant cited to the Court the case of *Calhoun v. Bernard,* 333 Fed. 2d 739 (9th CCA 1964), 359 Fed. 2d 400 (9th CCA 1966) as support for his position. In the Trial Court's Opinion, the Court employs the *Calhoun* case in support of his conclusion. In the *Calhoun* case there was a Memorandum Agreement entered into between the parties wherein the employer claimed he was not bound by a subsequent agreement modifying the earlier collective bargaining contract. In that particular case, the Appellate Court sustained the Trial Court's finding that the employer had committed himself to the collective bargaining agreement, particularly those subsequently entered into. It is interesting to note the similarity of the language in the Memorandum Agreement with that of the agreement now before this Court, excepting the language which incorporates the printed related documents. In the *Calhoun* case the pertinent paragraph of the Memorandum Agreement read as follows:

> "* * * That the undersigned employer agrees to comply with the wages, hours, and working conditions as set forth in that certain agreement referred to for convenience as the labor agreement between Southern California General Contractors and United Brotherhood of Carpenters

> and Joiners of America, dated May 1, 1954 (copy of which has been delivered to me and receipt of which is hereby expressly acknowledged) and any modifications or changes herein."

The argument in the *Calhoun* case primarily concerned itself with whether or not the word "herein" should have been "therein" and further whether the employer understood that he was bound to make payments to the pension trust by reason of future labor agreements. In the *Calhoun* case, the Trial Court found that the employer had, in fact, been given a copy of the 1954 Master Collective Bargaining Agreement and 1957 Amendments thereto when he signed the memorandum agreement in 1959 and that these collective bargaining agreements had incorporated the pension fund and contribution requirements. It is significant to note that the Trial Court in the *Calhoun* case went beyond the relatively clear written language of the memorandum signed by the employer therein to determine if he was bound by the bargaining agreement.

A pertinent case explaining the rule of contract law set forth herein is *Newton v. Smith Motors, Inc.,* 122 Vt. 409, 175 A 2d 514 (1961),

> "It is of course well established that a contract may be reached with reference to another writing, and the other document, or so much of it as is referred to, will be interpreted as a part of the main instrument. But the extrinsic writing must be connected by specific reference or by such mutual knowledge and understanding on the

part of both parties that reference by implication is clear. If the secondary instrument was not mentioned in the undertaking and was foreign to the minds of the parties at the time of their undertaking, it is clearly irrelevant as an aid to interpretation. (Nye v. Lovitt, 92 Va. 710, 715, 24 S.E. 345; Highland Inv. Co. v. Kirk Co., 96 Ind. App. 5, 184 N.E. 308, 309; Lee v. Rovert Mitchell Mfg. Co., 45 Ohio App. 502, 187 N.E. 371, 372; Williston, Contracts, Sec. 628 (Rev.Ed. 1936) p. 1801 et seq.; 12 Am.Jur., Contracts 246, p. 781.)"

In the case now before the Court, it is Appellant's position that as a matter of law (1) the references in the Trades Council Memorandum are insufficient (compare the language in the latter agreement with the memorandum in the *Calhoun* case) and (2) the most favored testimony produced by Appellees was that only a cursory and general discussion was had with respect to any of the agreements allegedly entered into; no review of any trust funds, or the provisions thereof was ever undertaken by either the signatories to the agreement or anyone else, and there was no physical transfer of the Trust Agreements or the Master Labor Agreements of 1965 to Mr. Hiatt. It is submitted these latter instruments were foreign to the negotiations and the minds of the parties at any time during their negotiations or the signing of the Trades Council Memorandum.

CONCLUSION

For the reasons set forth herein, it is again urged upon this Court to find that jurisdiction does not exist in this case, or that, alternatively and if the Court finds that jurisdiction does exist, there can be no recovery because the Trades Council Memorandum is not a valid binding contract, nor did it properly integrate extraneous documents and incorporate them into the said Memorandum.

Dated, Springfield, Oregon,
June 22, 1967.

Respectfully submitted,
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By HENRY J. CAMAROT,
Attorneys for Appellant.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

HENRY J. CAMAROT,
Attorney for Appellant.